

No. A06-109

STATE OF MINNESOTA

IN COURT OF APPEALS

Allen Javinsky, P.E.,

Appellant,

vs.

Commissioner of Administration, Dana Badgerow, in her official capacity
as head of the Minnesota Department of Administration,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. May a party who has failed to appeal a final judgment seek review of that judgment in an appeal from a subsequent decision in the same case?

This issue was not addressed by the trial court.

Minn. R. Civ. P. 54.02.

Minn. R. Civ. App. P. 104.01, subd. 1.

II. Does an engineer who is selected for a State project but not given a contract have a claim in promissory estoppel if State law provides that the State is not bound until a contract is signed?

The trial court held in the negative.

Telephone Associates, Inc. v. St. Louis County Board, 364 N.W.2d 378 (Minn. 1985).

Faimon v. Winona State University, 540 N.W.2d 879 (Minn. Ct. App. 1995).

STATEMENT OF THE CASE

Plaintiff/Appellant Allen Javinsky commenced this action against Defendant/Respondent Commissioner of Administration in November 2004 challenging the award of a State engineering project to a competitor. Appellant's Appendix (App. A.)

1. Javinsky's complaint sought money damages and an order directing that the project be awarded to him. The case was assigned to the Honorable Teresa Warner, Ramsey County district court.

Javinsky moved for a temporary restraining order. The motion was converted into a motion for temporary injunction. The parties agreed that the court's decision on the

motion would also constitute a final judgment on Javinsky's claims for mandamus and declaratory relief. A. Brf. at 3-4; November 30, 2004 Hearing Transcript at 3, *reprinted at* App. A. 152. These claims were based on Javinsky's argument that only the State Designer Selection Board had the authority to select the engineer for the project.

In December 2004, the trial court denied Javinsky's application for temporary relief and his actions for mandamus and declaratory relief. December 16, 2004 Order and Mem., *reprinted at* App. A. 216. The trial court noted on the order that there was no just reason to delay entry of judgment. App. A. 217. Consequently, the December 27, 2004 judgment was immediately appealable. However, Javinsky did not appeal. Most of the work on the project has now been completed. Third Christofferson Aff., *reprinted at* App. A. 258.

Javinsky indicated that he wished to pursue his claim for damages based on his promissory estoppel claim. Following discovery, the trial court granted the Commissioner's motion for summary judgment on this claim. October 27, 2005 Order and Mem., *reprinted at* App. A. 457. The court entered judgment in November 2005. App. A. 458. Javinsky has appealed that judgment. In his brief, Javinsky disputes both the December 2004 judgment and the November 2005 judgment.

STATEMENT OF FACTS

In 1999, the Commissioner of Administration¹ commenced a multi-stage project to repair sewer pipes and a tunnel at the Minnesota Correctional Facility in Faribault. The tunnel runs for approximately one mile under the Correctional Facility. The tunnel carries storm water into the Straight River, and a pipe buried below the floor of the tunnel carries sewage to a wastewater treatment Facility. Request for Proposals (RFP) ¶ 1, *reprinted at* App. A. 54; September 24, 2004 letter of Acting Commissioner Allin, *reprinted at* App. A. 141.

This case concerns the engineering contract for the last phase of the project, designated “Reshape and Grout of the Deep Tunnel at the Faribault Correctional Facility (Project 04-01).” The project involved corrective work to reshape sections of the tunnel, limit the erosion of the tunnel walls, stabilize the sandstone ceilings, and install a radio communication system in the tunnel. RFP ¶ 1.a., *reprinted at* App. A. 54.

Generally, the Commissioner of Administration awards professional and technical services contracts for the State of Minnesota based on a selection process coordinated by the State Architect’s Office, a division of the Department of Administration.² For certain

¹ Brian Lamb was the Commissioner of Administration during most of the events pertaining to this lawsuit. Lamb stepped down on September 16, 2004, at which time Acting Commissioner Kent Allin took over until Dana Badgerow was appointed on October 25, 2004.

² State contracts for professional or technical services generally are not subject to competitive bidding. “Because there is unique skill involved in these services, it is not necessarily in the public’s best interest to use the lowest bidder.” *Ruzic v. City of Eden* (Footnote Continued on Next Page)

projects, however, the selection is made by the State Designer Selection Board. Minn. Stat. §16B.33 (2004). The Commissioner must use the Designer Selection Board for building projects with estimated costs or fees above specified amounts. The statute defines a project as follows:

“Project” means an undertaking to construct, erect, or remodel a building by or for the state or an agency.

Minn. Stat. § 16B.33, subd. 1(h) (2004).

In 2002, Heidi Myers, the Director of the State Architect’s Office (formerly the Division of State Building Construction), a division of the Department of Administration, issued an internal memorandum clarifying that Minn. Stat. § 16B.33 does not require referral of “non-buildings” to the Board. March 25, 2002 Myers Mem., *reprinted at App. A. 137.*

On January 30, 2003, the State Architect’s Office issued an RFP to four engineering firms, including Javinsky, for Project 04-01. Christofferson Aff. ¶ 3, *reprinted at App. A. 133.* The Bonestroo firm was selected. *Id.* Consistent with Myer’s memorandum, the selection was made by the State Architect’s Office, not the Board.

Javinsky had worked on previous phases of the Faribault tunnel project. In December 2003, Javinsky met with Gordon Christofferson, Assistant Director of the State Architect’s Office, to protest the award of the project to Bonestroo. Javinsky

(Footnote Continued From Previous Page)

Prairie, 479 N.W.2d 417, 420 (Minn. Ct. App. 1991), *citing Krohnberg v. Pass*, 187 Minn. 73, 76, 244 N.W. 329, 330 (1932).

argued that the Designer Selection Board should select the designer for Project 04-01 because the Board had selected the designer for earlier phases of the work. Christofferson Aff. ¶ 4, *reprinted at* App. A. 133. The earlier phases of the work predated Myers' 2002 memo. Christofferson agreed. *Id.*

On February 3, 2004, Christofferson asked the Board to select a designer for Project 04-01. *Id.* The Board published an RFP. The RFP stated: "All costs incurred in responding to this RFP will be borne by the responder. This RFP does not obligate the State to award a contract or complete the project, and the State reserves the right to cancel the solicitation if it is considered to be in its best interest." RFP, ¶ 5.i., *reprinted at* App. A. 58. Javinsky and CNA Consulting Engineers (CNA) responded to the RFP. On April 20, 2004, the Board selected Javinsky and mailed him a letter notifying him of the selection. App. A. 59. The letter stated that the Commissioner of Administration had been informed of the selection and that Javinsky should hear from the agency shortly. *Id.*

On May 7, 2004, CNA sent a letter to Commissioner Brian Lamb protesting the Board's selection of Javinsky. App. A. 93. The Commissioner put the Javinsky contract on hold. Christofferson Aff. ¶ 6, *reprinted at* App. A. 134.

On June 23, 2004, Commissioner Lamb sent a letter to Board Chairperson James Lammers indicating that the issues raised by CNA appeared serious and warranted a thoughtful response. *Id.* ¶ 7, App. A. 134. The Commissioner requested that the Board revisit the selection process and describe its selection criteria and evaluation process. Chairperson Lammers responded to Commissioner Lamb on July 23, 2004 by e-mail. App. A. 95. Chairperson Lammers stated that in response to the Commissioner's request,

the Board revisited the selection process, conducted a detailed documentation of the selection criteria and evaluation of the proposals at one of its regular meetings, and upheld its selection of Javinsky. *Id.*

In a September 1, 2004 letter to Chairperson Lammers, Commissioner Lamb indicated that he had not yet received the information he had requested, but that he had reviewed a transcript of the Board's discussion of his request to revisit the selection process. App. A. 96. Commissioner Lamb stated: "I have reached the conclusion that the Board's selection process in this instance cannot withstand the level of scrutiny expected for public sector contracts awards." *Id.* In the letter, Commissioner Lamb notified Chairperson Lammers that he was withdrawing the request for the Board to select a designer and asking the State Architect's Office to issue a new solicitation for Project 04-01.

At the Commissioner's request, Gordon Christofferson of the State Architect's Office developed a set of selection criteria, assigned points, prepared a new REP, advertised in the State Register, and formed a team of evaluators. Christofferson Aff. ¶ 8, *reprinted at* App. A. 134. Javinsky, CNA, and a third firm, submitted proposals. *Id.* ¶ 9.

The trial court noted: "The selection process conducted by the Board appears to have been done with little documentation or defined criteria. On the other hand, the selection process conducted by the State Architect's Office, at the request of the Commissioner, was conducted by a group of evaluators using well-documented, clearly defined criteria." December 16, 2004 Order and Memorandum at 13, *reprinted at* App.

A. 228. On November 9, 2004, the scores from the evaluations were tallied. CNA received the highest score and was selected to receive the contract. Christofferson Aff. ¶ 8, *reprinted at* App. A. 134. Javinsky then commenced this action, claiming that the Commissioner was required to give him the contract based on his April 20, 2004 selection by the Board.

Javinsky's Statement of Facts is replete with factual assertions that are not supported by the record before the Court. The Commissioner will set the record straight on two points.

1. Javinsky was not required to turn down other work and did not turn down other work.

Javinsky asserts: "The delay caused by the Commissioner's decision to put the contract on hold required to [*sic*] Javinsky to wait, without the ability to take on replacement work while he waited. As late as August 2004, Javinsky was reminded of his commitment to keep sufficient time available by decision-makers in the Department." App. Brf. at 9.

First, the actual requirement in the RFP was that the responders commit "to enter into the work promptly, if selected." RFP ¶ 3.i, *reprinted at* App. A. 56. Javinsky was not required to desist from other work.

Second, nowhere in the record is there support for the statement that the Department reminded Javinsky of his commitment. Javinsky cites his affidavit in opposition to summary judgment in which he averred that he told Christofferson and Myers on August 3, 2004, that he had cleared his calendar and that they did not respond

or state that he was “released from this commitment of time.” App. Brf. at 10; August 8, 2005, Javinsky Aff., ¶ 14, *reprinted at* App. A. 322. Not responding to Javinsky’s statement that he had cleared his calendar is far different from affirmatively reminding Javinsky of an alleged commitment to keep his calendar clear.

The assertion in Javinsky’s brief that “Javinsky was reminded of his commitment” is not only unsupported by the record, it is directly contrary to Javinsky’s own admissions. Javinsky submitted an earlier affidavit containing a more complete description of his August 3, 2004 discussion with Myers and Christofferson. The context of the this discussion was that the schedule in the RFP had already been lost due to consideration of CNA’s protest.³ In the earlier affidavit, Javinsky disclosed that in the meeting, he offered to “compress the schedule” in order to complete the project by the spring of 2005. November 21, 2004, Javinsky Aff., ¶ 9, *reprinted at* App. A. 44. He admitted that Myers responded that it was “too late to start the design at this time and still get the contract out for construction this winter” and that “because it was too late, they were going to take the time to consider the protest filed by a third party against my selection by the State Designer Selection Board.” *Id*; *see also* Javinsky Depo. T. 189, *reprinted at* App. A. 418. Thus, Javinsky fully understood that the State did not require him to remain committed to the tunnel project in 2004.

³ Under the RFP schedule, design work was to have started June 1, 2004 and been completed by July 7, 2004. February 2004 RFP, ¶ 1.f., *reprinted at* App. A. 55. On or about July 20, 2004, Christofferson told Javinsky that “proj. could be delayed to next yr.” Javinsky Notes, *reprinted at* App. A. 281.

Third, Javinsky admitted that he did not turn down any work during the period April through September 2004, and he does not recall any projects for which he could have applied but did not apply during that time period. Javinsky Depo. T. 187, 247, *reprinted at* App. A. 417, 421. Javinsky now considers himself semi-retired. *Id.* at T. 240-41, App. A 419-20.

2. The State did not tell Javinsky that he would receive the contract.

Javinsky's brief states, "On eight separate occasions between late May and late August 2004, Department officials made numerous oral statements to Javinsky, indicating that he would be able to proceed in a short time with the Project." App. Brf. at 13. There is no support in the record for this statement. In his affidavits, Javinsky avers that State employees made a number of statements to him, *e.g.*, that "Admin. is proceeding with the contract," but there is no reference in his affidavits to any State employee stating that Javinsky would be able to proceed with the project, let alone "in a short time." August 8, 2004 Javinsky Aff., ¶15, *reprinted at* App. A. 322. Further, Javinsky's statement that he was told that "Admin. is proceeding with the contract" is misleading because Javinsky admitted that he was told that although the Department was processing the contract, it would not be sent out to him. Javinsky Depo. T. 117-20, *reprinted at* App. A. 269; *see also* Javinsky's notes of May 14, 2004 conversation with Department employee Sharon Schmidt at B-4, *reprinted at* App. A. 279.

Javinsky states that the Department did not inform him about the progress of CNA's protest. Pl. Mem. at 9-11. Christofferson informed Javinsky on May 11, 2004,

that he should contact the Commissioner directly concerning CNA's protest because it was the Commissioner who was making the decisions. Christofferson T. 54, 57, *reprinted at* App. A. 346, 347. Javinsky chose not to do so. Lamb T. 30, *reprinted at* App. A. 427. Javinsky, however, remained in frequent contact with other Department employees while CNA's protest was under consideration. Javinsky's notes show 19 conversations with State employees concerning the project and CNA's protest between April 29, 2004, when Rooney first told Javinsky that CNA was disputing his selection and September 1, 2004, when the Commissioner upheld the protest. Javinsky Notes at B-3 to B-6, *reprinted at* App. A. 278-81. The notes show that Javinsky was frequently updated on the progress of the protest and that the Commissioner was taking the protest seriously. *Id.* Javinsky also obtained copies of CNA's protest and other documents. Christofferson T. 54-55, *reprinted at* App. A. 346.

Javinsky alleges that he was "misled about the nature of the delay" and that "the Department presented falsely optimistic statement to him about getting the contract, despite the fact that the Commissioner had expressed serious reservations about the validity of the SDSB selection process as early as June 15, 2004." App. Brf. At 11, 33. Javinsky is glossing over the time periods in which the statements were made. The two alleged predictions were made in April 2004 and on May 20, 2004. Javinsky Aff. ¶ 10, *reprinted at* App. A. 319-20. The Commissioner told Christofferson on May 21, 2004, that he had put the Javinsky contract on hold. Christofferson Aff. Para 6, *reprinted at* App. A. 134. Once the Commissioner placed Javinsky's contract hold on May 21, 2004, no Department employee made any predictions as to likelihood of success of CNA's

protest. The employees' earlier predictions may have been wrong, but they were made in good faith. There is no evidence to support Javinsky's assertion that he was being told that he would be getting the contract during the same time period that the Commissioner was seriously considering overturning his selection. *Id.* At 12, App. A. 468.

Further, these statements were not made by "decision-makers" as Javinsky contends. Javinsky was specifically informed that as to CNA's protest, the only decision-maker was the Commissioner, and he should contact the Commissioner if he wanted information. Javinsky intentionally chose not to do so. Lamb T. 30, *reprinted at* App. A. 427; Javinsky Aff. ¶ 17, *reprinted at* App. A. 322.

STANDARD OF REVIEW

It is appropriate for a court to order summary judgment when the evidence, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ruter v. State*, 695 N.W.2d 389, 392 (Minn. Ct. App. 2005); Minn. R. Civ. P. 56.

ARGUMENT

I. JAVINSKY'S MANDAMUS AND DECLARATORY RELIEF CLAIMS ARE NOT PROPERLY BEFORE THE COURT OF APPEALS.

A. Javinsky's Attempted Appeal Of The 2004 Judgment Is Untimely.

Javinsky challenges the trial court's denial of his claims for mandamus and declaratory relief. Javinsky did not appeal the judgment denying these claims, and he may not seek review of them in his present appeal.

On December 16, 2004, the trial court denied Javinsky's claims for mandamus and declaratory relief. The order included the requisite language directing the entry of an immediately appealable judgment: "There is no just reason for delay" and "Let judgment be entered accordingly." App. A. 217; *see* Minn. R. Civ. P. 54.02. Judgment was entered December 27, 2004. App. A. 217. Javinsky acknowledges that this decision was a "final judgment on Javinsky's mandamus and declaratory judgment claims." App. Brf. at 4.

Javinsky did not appeal the December 2004 judgment, and the time in which to do so elapsed about ten months prior to his January 13, 2006 notice of appeal herein. Minn. R. Civ. App. P. 104.01, subd. 1. Javinsky's notice of appeal refers only to the November 14, 2005 judgment, not the 2004 judgment. App. A. 472.

Since Javinsky failed to appeal the trial court's denial of his mandamus and declaratory relief actions, he may not seek review now. The 1983 Comment to Minn. R. Civ. App. P. 104 states: "If an appeal is not taken with 90 days after entry of such a judgment, it becomes final and not subject to later review." In 1998, the appeal time was shortened to 60 days, but the principle of finality remains unchanged.

B. Javinsky's Actions For Mandamus And Injunctive Relief Are Moot.

Javinsky's mandamus and declaratory relief claims are untimely not only because he has not preserved them for appeal but also because the relief he seeks is no longer available. Javinsky seeks to compel the Commissioner to negotiate and execute a contract with him. Following the trial court's December 2004 order, the contract was given to CNA and is now mostly complete. July 15, 2005 Third Christofferson Aff.,

reprinted at App. A. 258. There are no longer any public funds available for a contract with Javinsky. The only public funds available for the project have already been committed to the contract with CNA. *Id.* “A public officer will not be compelled by mandamus to proceed in an undertaking where there are no public funds therefore . . .” 31 Dunnell Minn. Digest *Mandamus* §1.06(d) (4th ed. 1996).

In *Telephone Associates, Inc. v. St. Louis County Board*, 364 N.W.2d 378 (Minn. 1985), the Minnesota Supreme Court determined the scope of relief available in cases of improper bidding procedures. The Court noted: “The phone system is installed and operating. To order its removal now would not be in the public interest.” *Id.* at 382. The Court adopted the rule set forth in *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084 (6th Cir. 1981), permitting recovery of bid preparation and protest costs.

Similarly, in *Owen*, the court stated: “It is now too late for injunctive relief to be effective because at oral argument we were informed that construction of the Criminal Justice Center was substantially complete. Accordingly, we dismiss as moot Owens’ claims for injunctive relief. For the same reason, we also dismiss as moot the claim for mandamus, without ruling on the availability of this type of relief.” 648 F.2d at 1094 (footnote omitted).

Javinsky argues that his claims are not moot, App. Brf. at 18-22, but his Statement of the Case to this Court states that he realized that “Appellant’s writ of mandamus and declaratory judgment claims . . . would become moot in the event Appellant’s application for a [temporary] injunction was denied.” App. Statement of the Case at 4. When Javinsky sought a temporary restraining order from the trial court, he argued, “Without a

TRO, Project 04-01 could easily be completed during the pendency of the litigation, and there would be nothing left to award Plaintiff at the end. This would make a writ of mandamus an empty letter, in that the object of the writ would no longer exist.” Pl. Mem. in Support of TRO at 9, *reprinted at* App. A. 39.

Javinsky points to the mootness exception that a case may be reviewed if it raises issues capable of repetition yet evading review. App. Br. at 20; *see In re McCaskill*, 603 N.W.2d 326, 328 (Minn. 1999). Javinsky argues that a plaintiff must act within the limited window of time “after the Designer Selection Board has picked a designer/contractor, but before the Department has finalized and executed a contract with the person or entity chosen” App. Brf. at 20. This argument is incorrect. A plaintiff may bring an action challenging the selection process as soon as the RFP is issued. In the present case, the Department published an RFP on October 4, 2004, indicating that the selection would be made by the Department and not the Designer Selection Board. *Christofferson Aff.* ¶ 8, *reprinted at* App. A. 134. Javinsky chose to participate in the new selection process. He did not sue until November 9, 2004, after he was notified that he was not selected.

Javinsky also argues that the present circumstances are within the “collateral consequences” exception to the mootness rule discussed in *McCaskill*, *supra*. App. Br. at 20-21. However, Javinsky provides no authority that the “collateral consequences” he cites, such as “the stigma of his unsuccessful protest,” *id.*, are within the exception.

C. The Commissioner Was Not Required To Refer The Project To The Designer Selection Board.

Javinsky argues that the tunnel for the Faribault Correctional Facility is a “building” within the meaning of Minn. Stat. § 16B.33, subd. 1(h), requiring that the project engineer be selected by the Designer Selection Board. This argument was the basis for Javinsky’s mandamus and declaratory relief actions. Since he did not appeal the 2004 judgment on those actions, this argument is foreclosed. Javinsky’s surviving action in promissory estoppel is not based on his statutory argument. Javinsky did not make this argument in opposing summary judgment on his promissory estoppel claim and he may not raise it now.

Even if this argument were not foreclosed, the argument would fail because it depends on a strained interpretation of the statute and is unsupported by any genuine authority.

Javinsky does not argue that the tunnel itself is a building, but that it is a part of a building because it is on a building’s grounds. App. Brf. at 28. However, infrastructure by its nature is often on building grounds and connected to buildings. Javinsky’s argument would allow driveways, utility services, walls, fences, and sidewalks to be defined as buildings.

Javinsky’s interpretation of “building” is particularly inappropriate for the tunnel project. The tunnel is not accessible to pedestrians, and there is no access from any building to the tunnel. September 24, 2004 letter of Acting Commissioner Allin, *reprinted at* App. A. 141. The work was not part of a larger project involving

reconstruction or remodeling of a building. In making its selection of designers, the Designer Selection Board is required to consider, *inter alia*, “ability to deal with aesthetic factors.” Minn. R. 3200.0700(B). Aesthetic factors are irrelevant to underground tunnels and sewers.

In interpreting a statute, a court may consider “the object to be attained.” Minn. Stat. § 645.16(4). One object of the statute is to allow subjective factors such as aesthetics to be considered when selecting designers for State buildings. In contrast, proposals for design of infrastructure may be evaluated using purely objective criteria. Javinsky offers no explanation why it would make sense for infrastructure projects to be referred to the Designer Selection Board rather than the State Architect’s Office.

A court may consider “administrative interpretations of the statute.” Minn. Stat. § 645.16(8) (2004). This Court has stated:

Although we are not bound by the agency’s interpretation of the law, an agency’s interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature.

Matter of University of Minnesota, 566 N.W.2d 98, 103 (Minn. Ct. App. 1997); *see similarly In re Universal Underwriters Life Ins. Co.*, 685 N.W.2d 44, 45-46 (Minn. Ct. App. 2004); *In re American Iron and Supply Company’s Proposed Metal Shredding Facility*, 604 N.W.2d 140, 144-45 (Minn. Ct. App. 2000); *but see Anderson v. State, Dept. of Natural Resources*, 693 N.W.2d 181 (Minn. 2005) (no deference to agency interpretation of warning label on pesticide container where the agency was not responsible for approving or enforcing such labels, agency interpretation was not made in

the course of an agency enforcement proceeding or adjudication, and agency interpretation was expressed for the first time in an affidavit filed after it had been sued).

The interpretation that the statute does not require the Commissioner to refer infrastructure projects to the Board was first expressed in Myers' 2002 Memorandum, App. A. 137, and was not disputed by the Board. *Lammers Aff., reprinted at App. A. 260.* The trial court determined:

The Commissioner's interpretation of the term "building" is a reasonable one. It is not unreasonable, or contrary to the plain meaning of the terms, to classify a tunnel used for storm water runoff, containing sewer pipes, and accessible only to maintenance personnel as infrastructure and not a building.

It is clear that the legislature did not intend to require the use of the Board for all State Agency construction or remodeling projects. If this were the legislature's intent, they would not have provided a limiting definition of the word "project." However, a definition limiting the use of the Board to projects involving "buildings" was provided, and the Commissioner has reasonably interpreted that definition.

Order and Mem. at 12, *reprinted at App. A. 227.*

III. THERE IS NO LEGAL OR FACTUAL SUPPORT FOR JAVINSKY'S PROMISSORY ESTOPPEL CLAIM.

A. Introduction

Javinsky claims that the State broke an implied promise to hire him and that he should be able to recover damages. The trial court, analyzing the claim using general principles of promissory estoppel, rejected that claim as a matter of law. The Commissioner agrees that Javinsky's claim does not satisfy general principles of promissory estoppel, but believes that the standard should have been more stringent

because the claim is made against the State. In particular, the fact that the promise alleged by Javinsky would violate State law should inform all aspects of the analysis.

B. The State Did Not Make A Promise To Javinsky.

The first element of promissory estoppel is a clear and definite promise. *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995); *Faimon v. Winona State University*, 540 N.W.2d 879, 882 (Minn. Ct. App. 1995). The trial court found that this element was satisfied by the Designer Selection Board's April 20, 2004 letter notifying Javinsky that he had been selected. App. A. 466. The Commissioner disagrees.

1. The statements made to Javinsky do not constitute a clear and definite promise.

First, the Board's notification to Javinsky that he had been selected was a statement of fact, not a promise, and it was true. The trial court characterized this statement as a "clear and definite commitment that Javinsky had been selected," October 27, 2005 Order and Mem. at 10, *reprinted at* App. A. 466, but the statement contained no words of commitment or promise. The statement would be relevant to a promise only if selection necessarily meant that Javinsky would be given the contract. However, there was no such implication. In analyzing the third element of promissory estoppel, injustice, the trial court correctly noted:

Here, Defendant's promise is a clear and definite statement that Javinsky was selected by the Board. Selection by the Board does not automatically lead to receipt of a contract. This process allows for challenges of the Board's selection. A challenge occurred in this case, and Defendant made the decision to "de-select" Javinsky and conduct another selection process. This Court has previously held that Defendant acted in accordance with Minnesota Statutes in making this decision.

Id. at 12, App. A. 468. The foregoing analysis applies to the first element of promissory estoppel as well as the third.

State contracting is a multi-stage process. Being “selected” simply means that the vendor can proceed to the next stage. A bid protest is only one of a number of reasons why a selection might not result in a contract. The State makes no promise or commitment to the vendor until it gives the vendor a fully executed contract.

Javinsky admits that the State did not explicitly promise to give him the contract.⁴ His theory is that the April 20, 2004 letter and other statements by State employees constituted an implied promise to give him the contract. But, as noted, the statement that Javinsky had been selected is not an implied promise to give Javinsky the contract. Further, implied promises do not meet the “clear and definite” standard for promissory estoppel.

The trial court appears to have viewed Javinsky’s selection as an implicit commitment that the State would process a contract with Javinsky unless the State had proper grounds to abort the process. This view inappropriately shifts the burden to the State to show that it was justified in not honoring the “commitment.” The State should have proper grounds for its decisions, but many of its decisions are discretionary and not open to legal challenge. Selecting a responder does not constitute a commitment and does not give the responder the right to challenge decisions of the State unless the

⁴ The following is from Javinsky’s deposition:

Q. Did any State employee tell you you were assured of getting the contract?

A. [Javinsky] Nobody said those specific words to me.

T. 122, reprinted at July 15, 2005 Vasaly Aff., Ex. A.

decisions violate State law. As will be discussed below, Javinsky is not seeking to vindicate State law, but to circumvent to State law.

2. A promise to Javinsky would have been contrary to State law.

State procurement law limits the definition of an enforceable contract to “any written instrument or electronic document containing the elements of offer, acceptance, and consideration to which an agency is a party, including an amendment to or extension of a contract.” Minn. Stat. § 16C.02, subd. 6 (2004). Minn. Stat. § 16C.05, subd. 2(a) (2004) provides:

A contract is not valid and the state is not bound by it . . . unless:

- (1) it has first been executed by the head of the agency or a delegate who is a party to the contract;
- (2) it has been approved by the commissioner [of administration]; and
- (3) the accounting system shows an encumbrance for the amount of the contract liability.

The implied promise alleged by Javinsky would violate State procurement law because, *inter alia*, it was not in writing and was approved or executed by the Commissioner of Administration:

Valid contracts with the state must . . . comply with certain statutory formalities. They must be in writing and contain the elements of offer, acceptance and consideration. Minn. Stat. § 16B.01, subd. 4 (1984). Additionally, the state is not bound by a contract unless it has been properly executed, approved in writing, and the full amount of contract liability has been appropriated. Minn. Stat. § 16B.06, subd. 2 (1984).

Morris v. Perpich, 421 N.W.2d 333, 339 (Minn. Ct. App. 1988).

The Designer Selection Board's selection of a designer is subject to the Commissioner's discretion whether to enter into a contract with the designer. Minn. Stat. §§ 16B.33, subd. 4(d) and 16C.05, subd. 2(a)(2) (2004). In addition, State rule provides:

The state may reject any or all responses or portions thereof. Responses must be rejected for good and sufficient cause, including but not limited to, abandonment of the project by the state, insufficient state funds, correction of a process error, disclosure or discovery of an organizational conflict of interest, or a determination that the responder is not a responsible vendor. . . .

Minn. R. 1230.0700, subp. 3 (Supp. 2004). The RFP specifically disclaimed a commitment to any responder prior to execution of a contract with the selected vendor. The RFP stated: "All costs incurred in responding to this RFP will be borne by the responder. This RFP does not obligate the State to award a contract or complete the project, and the State reserves the right to cancel the solicitation if it is considered to be in its best interest." RFP, ¶5.i, App. A. 58.⁵

Minnesota courts have consistently upheld the State's right to reject all bids. *See, e.g., J.L. Manta, Inc. v. Braun*, 393 N.W.2d 490, 494 (Minn. 1986) ("[W]e have previously recognized that an express reservation in the specifications, buttressed in this case by the statutory reservation, is sufficient authorization for the State's rejection of all bids even after the commencement of litigation and issuance of an injunction against the

⁵ Javinsky's alleged expectation interest is particularly remote because he was selected for a consultant contract rather than a bid contract. The State's standard consultant contract provides that even after the contract is fully executed, the State "may cancel this contract at any time without cause" and be responsible only for "payment, on a pro rata basis, for services satisfactorily performed." State/Consultant Basic Services Agreement, ¶9.1.2 *reprinted at* App. A. 72. The RFP gave notice that a successful responder would be required to agree to such a contract. RFP, ¶1.k *reprinted at* App. A. 55.

initial award of the contract.”). If the solicitation notifies responders that a contract subject to final approval, the government may change its mind even after selecting a responder and negotiating a contract with it. *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121 (Minn. 1980). Resolicitation has been upheld even when the motive is “the expectation of getting lower bids on rebid.” *Ryan v. City of Coon Rapids*, 462 N.W.2d 420, 422 (Minn. Ct. App. 1990).

Javinsky’s present claim is fundamentally at odds with the public policy supporting the *Telephone Associates* decision. The Supreme Court noted that an unsuccessful bidder is generally not entitled to damages:

While it is true that an unsuccessful bidder has standing to maintain a proceeding to review the award of a contract in violation of the statute requiring that the contract go to the lowest responsible bidder, *this procedure is sanctioned merely to ensure enforcement of the statute.*

. . . [T]he authority for letting public contracts is derived for the public benefit and is not intended as a direct benefit to the contractor.

364 N.W.2d at 382 (citation omitted) (emphasis added). However, the Court stated:

[P]roper challenges to the bid-letting process should be encouraged. The efforts of Telephone Associates saved St. Louis County taxpayers almost one-half millions dollars.

364 N.W.2d at 382 (emphasis added). Based on this rationale, Telephone Associates was permitted to recover bid preparation and protest costs.⁶ In contrast, there is no public

⁶ Javinsky seeks lost profits. Complaint, ¶¶ 18, 36, *reprinted at* App. A. 7, 10. “Loss of profits shall not be considered an expense item” that is recoverable in a challenge to a State contract award. *Telephone Associates*, 364 N.W.2d at 383. A plaintiff may seek only bid preparation costs and protest costs. *Id.* The law in most jurisdictions is similar. *Ray Wilson v. Los Angeles Co. Metro. Transit Auth.*, 1 P.3d 63, 70 (Cal. 2000); *see also* (Footnote Continued on Next Page)

benefit to encouraging challenges to a proper RFP process, even if the plaintiff had reason to believe he would obtain an executed contract.

Permitting the originally selected responder to a deficient RFP process to obtain relief would undermine rather than enforce the statutory scheme. If the responder obtains an injunction awarding the contract to him despite process defects, it would mean that laws requiring a certain process, or giving the Commissioner the responsibility to ensure that the best process is followed, would be disregarded. Even if the responder receives only monetary relief, the applicable laws would be undermined because the agency would be pressured in future cases to disregard process defects in order to avoid liability.

An agency must be free to correct mistakes, even its own unilateral mistakes:

Although a private party -- no matter how innocent its reliance -- may have to accept the consequences of its mistake, it does not logically follow that government is bound by such a rule. The government may cancel a contract mistakenly awarded if necessary to preserve confidence in the fairness of the competitive procurement process.

Chemung Co. v. Dole, 781 F.2d 963, 972 (2nd Cir. 1986).

An agency must be permitted to cancel a defective RFP process without incurring liability to the originally selected responder, provided that the contract has not been executed. Although a resolicitation will disappoint the originally selected responder, such considerations are far outweighed by the public interest in a proper process, particularly because the originally selected responder will be permitted to participate in

(Footnote Continued From Previous Page)

Miami-Dade Co. School Board v. J. Ruiz Bus Service, Inc., 874 So.2d 59 (Fla. Ct. App. 2004).

the new process. The Commissioner is not aware of any Minnesota case in which a bidder or responder has successfully challenged a government decision to reject all bids and resolicit.

The State employees who communicated with Javinsky did not have the authority to enter into a contract with him. They could at most process the contract for the Commissioner's approval. In *Morris*, the court noted that, to bind the government, a government representative must have actual authority:

Though Doyle may have believed that Ries [the county administrator] had the requisite authority to enter into the agreement on behalf of the county, apparent authority is insufficient. "All persons contracting with municipal corporations are conclusively presumed to know the extent of the authority possessed by the officers with whom they are dealing." *Jewell Belting Co. v. Village of Bertha*, 91 Minn. 9, 12, 97 N.W. 424, 425 (1903). Doyle was required to ascertain whether the board had passed a resolution authorizing the payment of attorney's fees, or act at his peril.

Id. at 336. See similarly *Plymouth Foam Product, Inc. v. City of Becker, Minnesota*, 944 F. Supp. 781, 785 (D. Minn. 1996) (alleged oral contract did not comply with State law requiring municipal contracts to be in writing and executed by city officials; "parties dealing with municipalities cannot rely on an agent's apparent authority"). The federal circuit court of appeals has stated:

The United States Government employs over 3 million civilian employees. Clearly, federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States.

City of El Centro v. U.S., 922 F.2d 816, 820 (C.A. Fed. 1990) (footnote omitted).

C. Javinsky Did Not Rely On The State's Alleged Promise.

The second element of promissory estoppel is reliance. *Faimon*, 540 N.W.2d at 882. The trial court stated that State employees' statements to Javinsky "assuring him he would get the contract as well as evidence that being selected by the board generally results in receiving a contract to perform the work . . . could support a finding that he relied on Defendant's promise in making himself available to begin work immediately." Again, the Commissioner disagrees.

First, "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law." *Brown v. Minn. Dept. of Public Welfare*, 368 N.W.2d 906, 912 (Minn. 1985) (citation omitted). Javinsky was familiar with State contracting procedures. He states: "[S]ince 1999, virtually all of my contracts and income have come from work for the state." November 21, 2004 Javinsky Aff., ¶4, App. A. 43. It is an elementary principle of State contracting that the State is not bound until it issues an executed contract. Javinsky testified: "And until I have a contract sitting in my hand I don't have 100 percent confidence that the contract is complete." Javinsky Depo. T. 127, *reprinted at* App. A. 271.

Second, as noted by the trial court, *Faimon* makes a distinction between relying on "an unconditional promise" versus relying on facts that lead one "to predict good prospects." *Faimon*, 540 N.W.2d at 883; Order and Mem. at 12, *reprinted at* App. A. 468. In *Faimon*, the Court of Appeals noted that the promise to Faimon was made in the context that of a "mutual understanding that respondent had the right to hire someone else or no one at all." The trial court stated: "This Court holds that Plaintiff, Javinsky was in

a similar situation. Javinsky knew that there was no guarantee that Defendant would award him the contract, even after he was selected by the Board. Javinsky was aware that challenges to the selection process occurred and succeeded since Javinsky himself successfully initiated a challenge to the first designer, Bonestroo, selected for this project.” Order and Mem. at 13, *reprinted at* App. A. 469 (footnote omitted).

Third, there is no evidence in the record of any statements to Javinsky “assuring him he would get the contract.” *Id.* at 11, App. A. 467. The alleged statements all related to events several steps short of contract formation, *e.g.*, a prediction that CNA’s protest would not succeed, when the Designer Selection Board would reconsider the matter, when the Commissioner would make a decision, etc.

The trial court noted, “The evidence presented by Javinsky of various statements by employees of the Department of Administration is insufficient to constitute a clear and definite promise that Javinsky would be given the contract.” *Id.* at 10, App. A. 466. If the State did not make a promise to Javinsky, then there was nothing for him to have relied on for purposes of promissory estoppel analysis. The statements and circumstances may have made him “optimistic,” but, as *Faimon* held, reliance on good prospects is not the same thing as reliance on an unequivocal promise.

The trial court believed that Javinsky’s selection and his alleged reliance on that selection satisfied the first two elements of promissory estoppel. The Commissioner believes that selection and reliance on selection are irrelevant unless selection necessarily results in a contract, and that is not the case.

Fourth, there is no genuine evidence that Javinsky in fact relied on getting the contract. He makes a general conclusory allegation in his affidavit that he cleared his calendar and lost work in anticipation of getting the contract, but “Javinsky provided no evidence that he turned down other jobs or that he had other jobs available.” Order and Mem. at 14, *reprinted at* App. A. 470.

D. No Injustice Resulted From The Commissioner’s Actions.

The third element of promissory estoppel is injustice as a result of the broken promise. *Faimon*, 540 N.W.2d at 885. The trial court found that Javinsky had not suffered injustice because he was aware that selection does not always lead to a contract. Order and Mem. at 13, *reprinted at* App. A. 469. The court then weighed the public policies involved, concluding:

It would be far more unjust to discourage the Department of Administration from taking measures designed to promote a fair and above-board selection process when selecting contractors than it would be for Plaintiff, Javinsky to remain available to perform the work and to participate in an additional RFP.

In considering many factors, including the reasonableness of Plaintiff’s reliance and a weighing of public policies, this Court makes a determination that enforcement of the promise in this case would not have the affect of preventing injustice, rather, it would have the opposite affect.

Id. at 14, App. A. 470.

E. A Party Asserting Estoppel Against The Government Has A Heavy Burden.

“[E]stoppel is not freely applied against government,” *REM-Canby, Inc. v. Minn. Dep’t. of Human Services*, 494 N.W.2d 71, 74 (Minn. Ct. App. 1992). *Christensen v. Mpls. Muni. Employees Retirement Bd.*, 331 N.W.2d 740, 749 (Minn. 1983), stated:

“Promissory estoppel, like equitable estoppel, may be applied against the state to the extent that justice requires.” Nevertheless, a party asserting estoppel against the government “has a heavy burden of proof.” *Ridgewood Development Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980). There are several reasons why estoppel may not be applied in the present case.

First, “[w]here an agency has no authority to act, agency action cannot be made effective by estoppel.” *Axelson v. Minn. Teachers’ Retirement Fund Assoc.*, 544 N.W.2d 297, 299-300 (Minn. 1986) (citations and footnote omitted). Although the Department had the authority to promise that the selection process would be conducted in conformity with statute, it did not have the authority to promise that the selected vendor would receive an executed contract, since such a promise would be contrary to State contract requirements. Minn. Stat. § 16C.05, subd. 2(a) (2004).

Second, to estop a government agency, “the most important element” is wrongful conduct. *Ridgewood Development Co.*, 294 N.W.2d at 293. “Affirmative misconduct, rather than simple inadvertence, mistake, or imperfect conduct is required for estoppel to be applied against the government.” *REM-Canby*, 494 N.W.2d at 74; *see also In Re Westling Mfg., Inc.*, 442 N.W.2d 328, 332-34 (Minn. Ct. App. 1989). The Designer Selection Board’s notification to Javinsky that he had been selected and the statements of Departmental employees indicating that a contract was in process were true at the time they were made. The Commissioner’s later decision to resolicit was in good faith because the Commissioner was not required to delegate the selection to the Board and because the Board did not adequately document its selection process. “The

Commissioner had the authority to withdraw the request from the Board and ask the State Architect's Office to select the designer." December 21, 2001 Order and Mem. at 14, *reprinted at App. A. 229.*

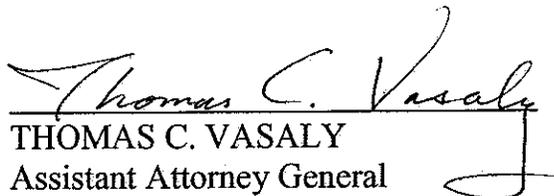
CONCLUSION

Javinsky offers no precedent for recovery against the State by a responder who was selected but did not receive a contract. The State clearly did not intend to induce Javinsky to rely on the existence of a contract before a contract was executed because the RFP specifically advised responders to the contrary. Javinsky may have reason to be disappointed, but he has suffered no injustice because he has been treated in accordance with statute, rule, and the RFP. The judgment of the trial court should be affirmed.

Dated: May 30, 2006

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 13,405 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.



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AG: #1613755-v1